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November 17, 2022

Via ECF

The Honorable Robert W. Lehrburger
United States District Court
Southern District of New York
40 Foley Square, Room 2204
New York, New York 10007

Re: *Therabody, Inc. v. Tzumi Electronics LLC, et al.*
Civil Action No. 1:21-cv-07803-PGG

Dear Judge Lehrburger:

This firm represents defendant Tzumi Electronics LLC (“Tzumi”) in the above referenced patent litigation. Pursuant to Your Honor’s directives at the oral argument on November 16, 2022, we hereby attach the presentation slides presented in connection with Tzumi’s argument in support of its Motion for Partial Summary Judgment of Non-Infringement (ECF Nos. 67-69, 72-74).

We thank the Court for its attention to this matter.

Respectfully submitted,

/s/ Scott D. Stimpson
Scott D. Stimpson

Enclosure

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

Therabody, Inc. v. Tzumi Electronics, LLC
Civil Action No. 21-7803

Summary Judgment Hearing

November 16, 2022

Presentation for Tzumi Electronics, LLC

Scott D. Stimpson

Sills Cummis & Gross P.C.

Proposed Constructions

- Terms at Issue: Three handles must be capable of being grasped.
 - Example, '448 Claim 6: "a user can grasp any of the first, second, or third handle portions independently to use the percussive massage device."
- Tzumi Proposed Construction: All three handles must be of a length sufficient for a person with a large hand to firmly and comfortably grip each handle portion with at least three to four fingers extending through the opening.
- Therabody Proposed Construction: None.

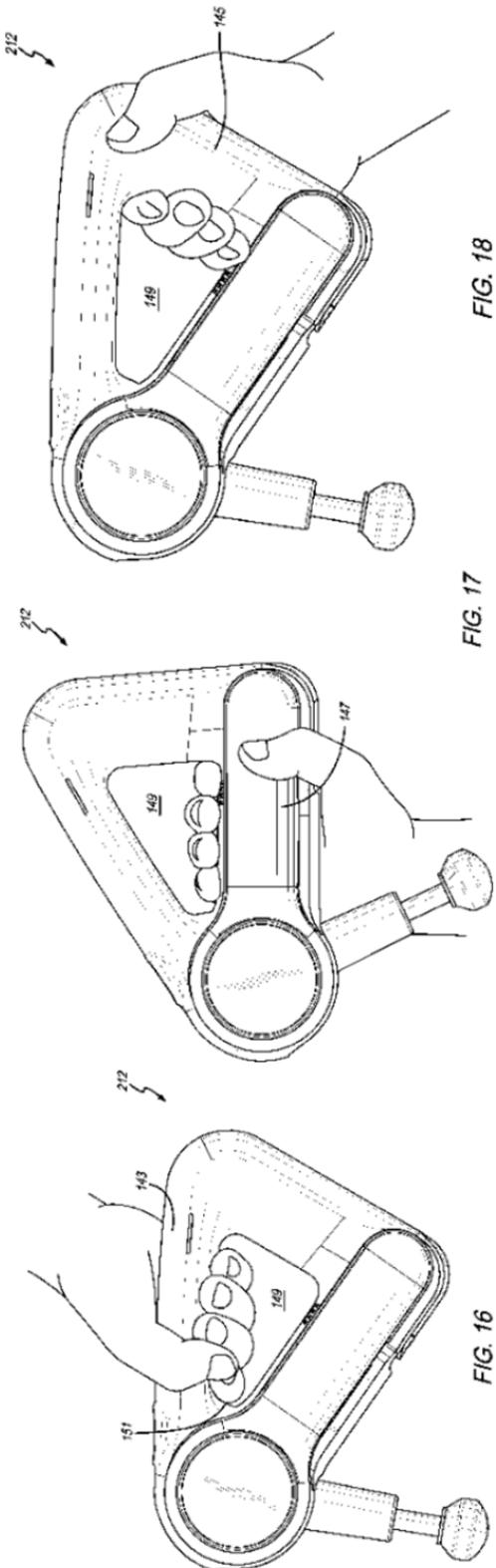
The Claim Language

- Grasp
- The Claimed Purpose: E.g., '448 Claim 6: "a user can grasp any of the first, second, or third handle portions independently **to use the percussive message device**."
- Field of the Invention: "vibrating massage device or percussive message device that provides reciprocating motion."

The Specification

- “All of the handle portions are *long enough* that they are configured such that a *person can grasp that particular handle portion to utilize the device.*” The ’448 Patent, 16:23–25.
- The length of each of the first, second and third handle portions is *long enough so that a person with a large hand can comfortably grasp each handle portion with at least three to four fingers extending through the handle opening, as shown in FIGS. 16-18.*” The ’448 Patent, 16:38–43.
- “It will be appreciated that these dimensions are optimized so that a *95th percentile male can grip any of the three handle portions with at least three and preferably four fingers extending through the handle opening to utilize the device.*” The ’448 Patent, 17:16–17:20.

The Specification



“FIGS. 16-18 show a user’s hand grasping the various handle portions.” *Id.* 16:38-39.

The Specification

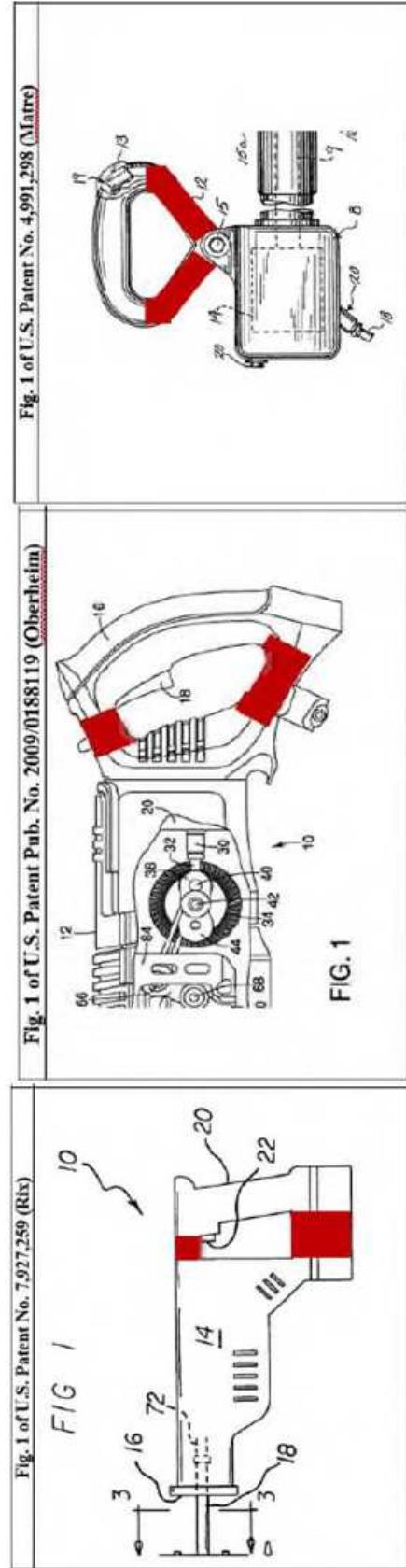
“[W]hen a patentee uses a claim term throughout the entire patent specification, in a manner consistent with only a single meaning, he has defined that term ‘by implication.’”

Bell Atlantic Network Services, Inc. v. Covad Comm. Group, Inc., 262 F.3d 1258, 1271 (Fed. Cir. 2001).

“A fundamental rule of claim construction is that terms in a patent document are construed with the meaning in which they are presented in the patent document.”

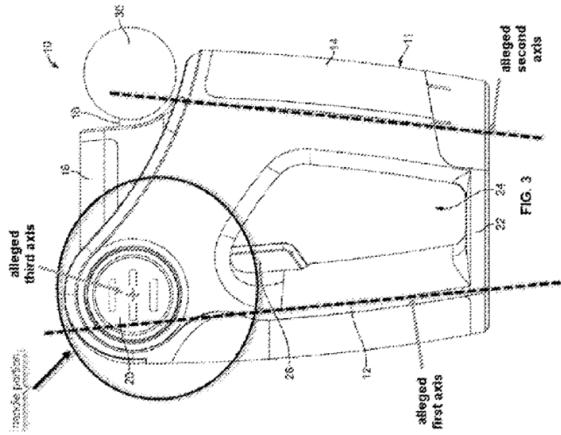
Merck & Co. v. Teva Pharms. USA, Inc., 347 F.3d 1367, 1371 (Fed. Cir. 2003).

The Positions of the Applicants (4/17/20)



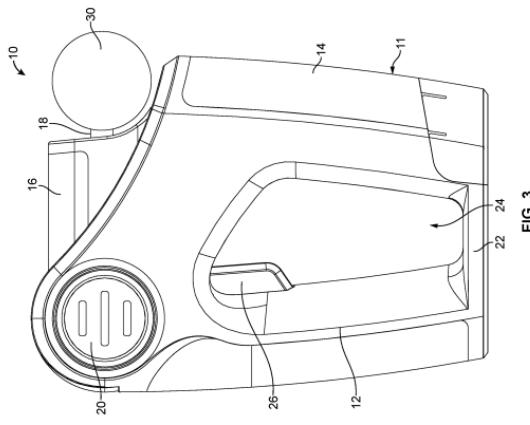
- “None of Rix, Haas, Oberheim nor Matre ... suggest that the alleged housings of the device can be grasped anywhere other than a single handle.” Ex. I, p. 17.
- “[T]he Rix, Haas, Oberheim and Matre devices and housings thereof are all much longer overall than the handle openings and alleged handle portions. This configuration would make it awkward and unwieldy for a user to grasp the various alleged handle portions and use the device as shown in FIGS. 16-18 of the present invention.” *Id.* at 21.

The Positions of the Examiner on Pepe



- Avoiding element 22 as third handle. Ex. L, pp. 3-5 ("unit 20 can be a handle") (9/22/20).
- After co-planar addition: "[T]he prior art does not disclose . . . a percussive massage device [that] includes first, second, and third generally straight handle portions . . . which are co-planar as set forth in independent claims 1 and 7." Ex. N, pp. 3-4.

The Positions of the Applicants on Pepe

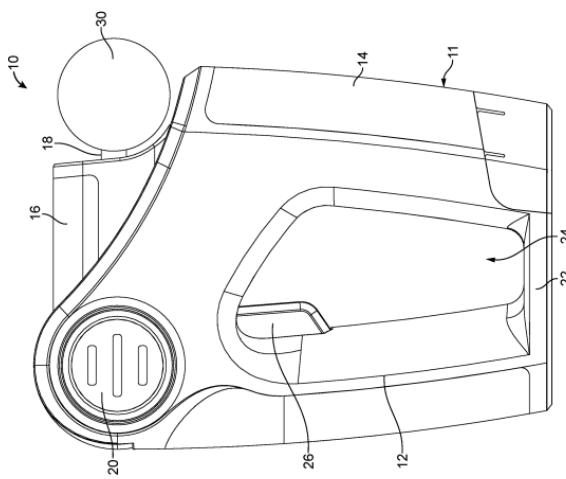


“Claim 1 has been amended to recite ‘wherein the first, second and third axes [of the grasping handles] are co-planar’ . . . **This feature is not disclosed, shown or suggested in Pepe . . .**”

Ex. M, p. 17

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The Therabody Inconsistency



Therabody: three co-planar grasping handles are "not disclosed, shown or suggested in Pepe..."

Therabody: Accused product does include three co-planar grasping handles

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